

## **RESPONSE TO MOTION TO SEVER OFFENSES**

Rule 13.3(a)(2), Ariz. R. Crim. P. -- The court should deny a defendant's motion to sever when the charges are connected together in their commission and proof of one offense would be admissible in a separate trial on the other offense.

The State of Arizona, by and through undersigned counsel, in response to the defendant's Motion to Sever Offenses, opposes the motion for the reasons set forth in the following Memorandum of Points and Authorities.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

On April 30, 1995, at approximately 10:43 p.m., the defendant Winston Jackson walked up to the drive-up window of a McDonald's Restaurant at 1250 South Country Club, Mesa, Arizona. The defendant first tried to force the drive-up window open; when this failed, he asked an employee, witness Pebworth, for water and she gave him a cup of water. A few minutes later, the defendant walked up to another drive-up window at the same McDonald's. An employee at the second window asked the defendant what he would like; the defendant asked if this was "the window where you pay?" The employee said it was and asked if the defendant would like anything. The defendant stated, "Yes, all the money in the cash register," and put his hand in his pocket as though he had a gun. Fearing for his safety, the employee opened the cash register. The defendant then reached through the window, grabbed the money, and fled on foot in a westerly direction.

Ms. Pebworth heard another employee yell that they had just been robbed. She looked up from her station and saw the same black male to whom she had given the water drive through the parking lot south of the restaurant in an older model white station wagon. It was later determined that the station wagon had just been stolen from

the McDonald's parking lot. The station wagon turned left out of the parking lot onto Country Club towards U.S. Highway 60. As the restaurant employees determined that the same man had approached both drive-up windows, the Mesa Police Department broadcast to local law enforcement agencies a description of the robber, the station wagon, and his direction of travel.

At approximately 10:50 p.m., Officer Haas of the Department of Public Safety (DPS) was working traffic control at a construction site on the ramp from westbound U.S. Highway 60 at westbound Interstate 10. He heard the broadcast concerning the armed robbery, the description of the white station wagon, and the direction the station wagon had last been seen traveling. Realizing that the wagon might be coming his way, Officer Haas turned on the right alley light of his fully marked DPS patrol car, illuminating all vehicles passing by on the ramp. The area was already partially illuminated by a large generator-powered light plant in the construction zone. The distance between Officer Haas and the passing vehicles was approximately fifteen feet.

Approximately one minute after the robbery broadcast, Officer Haas saw an older white Oldsmobile station wagon passing by. Officer Haas noted that the driver was a black male with short hair, wearing a dark blue or black long-sleeved shirt. As the driver passed the officer, the officer noted that the driver turned his head and looked back at the officer as if the driver were concerned about the officer's presence. Officer Haas then began to follow the station wagon and accelerated to try to overtake it. As he followed the wagon, DPS communications advised that the robbery suspect was a medium-built black male wearing a blue long-sleeved shirt and jeans, driving an older white station wagon. As Officer Haas gained on the defendant, the defendant suddenly

and without signaling swerved to the right, cutting across the far right lane and across the painted white gore to the ramp leading to northbound State Route 143.

Officer Haas was able to stay with the station wagon. He was closing in to get the wagon's license number when the defendant again made an abrupt lane change to the right without signaling. This time, the station wagon cut across the painted white gore and left State Route 143, taking the University Drive exit. It appeared to Officer Haas that the defendant was trying to elude him, so he requested that DPS Communications verify the subject vehicle description. Communications advised Officer Haas that the vehicle was indeed a full-sized white station wagon. At that point, several other DPS officers were assisting Officer Haas in keeping the defendant in sight.

At 10:55 p.m., Officer Haas attempted to make a traffic stop of the wagon at University Drive and I-60. The defendant had been braking for a red light, but he then immediately started to accelerate and ran two red lights. Officer Haas pursued the wagon with his emergency lights and siren fully activated, reaching a top speed of 60 M.P.H. A Phoenix Police helicopter joined in the pursuit by shining a light on the defendant's vehicle. At approximately 10:58 p.m., the defendant, still fleeing from Officer Haas westbound on Southern Avenue, swerved left, heading for eastbound traffic. The defendant's station wagon grazed the left side of an eastbound green truck and continued westbound. The defendant braked, then struck the left rear corner of a white station wagon that was behind the green truck. After striking the white station wagon, the defendant cut hard left and struck a third vehicle, a purple Mercury, head on. The impact knocked the purple Mercury backwards and caused it to spin 180 degrees.

The defendant was pinned inside the stolen station wagon he had been driving. Officers extricated the defendant from the stolen wagon and transported him to Maricopa County Hospital. The driver of the purple Mercury suffered a broken ankle and required surgery.

The defendant was charged with robbery, burglary, felony flight, vehicle theft, endangerment, and aggravated assault.

### **STATEMENT OF LAW:**

The defendant alleges that Counts 1 and 2 should be severed from the remaining counts because they are different and distinct, with no overlapping witnesses. Rule 13.3(a)(2), Ariz. R. Crim. P., provides:

#### Rule 13.3. Joinder

- a. Offenses. Provided that each is stated in a separate count, 2 or more offenses may be joined in an indictment, information, or complaint, if they:
  - (2) Are based on the same conduct or are otherwise connected together in their commission. . . .

Rule 13.4(a), Ariz. R. Crim. P., provides:

- a. In General. Whenever 2 or more offenses or 2 or more defendants have been joined for trial, and severance of any or all offenses, or of any or all defendants, or both, is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on motion of a party, order such severance.

At the time of his motion to sever, the defendant has the burden of showing that he would be prejudiced if the trial court refuses to grant separate trials. *State v. Atwood*, 171 Ariz. 576, 612, 832 P.2d 593, 629 (1992), *cert. denied*, 506 U.S. 1084 (1993); *State*

*v. Via*, 146 Ariz. 108, 704 P.2d 238 (1985), *cert. denied*, 475 U.S. 1048 (1986); *State v. Guillen*, 151 Ariz. 115, 118, 726 P.2d 212, 215 (App. 1986). If there is any such prejudice, the trial court must balance that prejudice against the countervailing considerations of judicial economy. *Via, supra*.

The defendant does not meet his burden of showing prejudice when “evidence as to one set of charges would have been admissible at the trial on the other set ‘as part of the complete picture.’” *Via*, 146 Ariz. at 115, 704 P.2d at 245, quoting *State v. Mincey*, 115 Ariz. 472, 483, 566 P.2d 273, 284 (1977), *rev’d on other grounds*, 437 U.S. 385 (1978). Accord, *State v. Atwood, id.* Offenses are considered “otherwise connected together in their commission” under Rule 13.3(a)(2), Ariz. R. Crim. P., when “the offenses arose out of a series of connected acts, and the evidence as to each count, of necessity, overlaps,” “where most of the evidence admissible in proof of one offense [is] also admissible in proof of the other;” or “where there [are] common elements of proof in the joined offenses.” *State v. Garland*, 191 Ariz. 213, 217, 953 P.2d 1266, 1270 (App. 1998), quoting *State v. Martinez-Villareal*, 145 Ariz. 441, 446, 702 P.2d 670, 675 (1985). In *Martinez-Villareal*, the court found that a burglary in which the defendant stole guns used to commit the subsequent homicides was sufficiently connected to join the homicide and burglary charges to be joined for trial. “Offenses may be joined as otherwise connected in their commission where, among other things, most of the evidence admissible in proof of one offense is also admissible in proof of the other.” *State v. Williams*, 183 Ariz. 368, 375, 904 P.2d 437, 444 (1995).

In this case, the defendant attempts to show prejudice by arguing that the robbery and burglary counts are not related to the remaining charges. The State's position is that the counts are intertwined. Had it not been for the robbery and burglary at the McDonald's, the defendant would not have been leaving the McDonald's parking lot in a stolen vehicle, attempting to elude officers, and endangering other motorists. Evidence of the commission of the burglary and robbery is relevant to show the reason that the defendant fled the scene and attempted to evade officers. Relevant evidence as to other counts is admissible at trial when it gives the jury the complete picture and is helpful in understanding the circumstances of the offenses. *State v. Via, supra*; *State v. Befford*, 157 Ariz. 37, 40, 754 P.2d 1141, 1144 (1988); *State v. Bloomer*, 156 Ariz. 276, 280, 751 P.2d 592, 596 (App. 1987).

The State submits that witnesses on the robbery and burglary charges are also relevant witnesses on the car theft and felony flight charges. The police departmental reports reflect that witness Pebworth, after hearing that the restaurant had been robbed, looked out the window. She saw the same man she had given water to earlier when he came to the drive-up window on foot, but now he was driving a white station wagon. She witnessed the defendant operating the stolen vehicle in the very parking lot from which it was just stolen. The same witness would testify that she gave the police a physical description of the burglary/robbery suspect, the vehicle he was driving, and the direction he was traveling. But for the information Ms. Pebworth gave the police, Officer Haas's attention would not have been drawn to the defendant in the stolen station wagon. To show the complete picture of the defendant's actions, the jury must see the underlying offenses that resulted in the defendant's fleeing from the police. The

defendant's reckless driving in his flight led to the serious physical injuries to one victim and the endangerment of the others.

This Court has discretion to deny the defendant's motion to sever if this Court finds that the defendant has not met his burden of showing prejudice. See *State v. Van Winkle*, 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996). In this case, it is evident that all counts must remain joined. The complete picture shows a continuing series of events beginning with a robbery/burglary and ending with serious physical injuries to the victim and the defendant.

**CONCLUSION:**

The defendant has failed to support his allegations of prejudice. Therefore, the State asks this Court to deny the defendant's motion to sever offenses.